Supreme Court, U.S.
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No. 99-742

In The

Supreme Court of the United States

ALBERT AND ESTELLE BINDER,
in their individual capacities and on behalf
of all persons similarly situated,

Petitioners,

vs.

IAN R. WILSON, CARY S. FITCHEY,
MARK L. STEVENS AND DELOITE & TOUCHE,

Respondents.

On Petition For Writ Of Certiorari
To The Ninth Circuit Court Of Appeals

BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

Properly construed, Mr. Binder's petition actually presents a narrow and straightforward inquiry:

> Whether the district court's factually-dependent and conventional application of *Basic*, *Affiliated Ute*, and Federal Rule of Civil Procedure 23, as affirmed by the Court of Appeals for the Ninth Circuit, warrants further review by this Court.

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STATEMENT OF THE CASE

A. Nature of the Case

This action presented the efforts of a relatively minor investor, Albert Binder,[1] who sought to rectify alleged investment losses he sustained after investing in a small "start-up" corporation, Aqua Vie Beverage Corporation ("AVBC"). Mr. Binder alleged his adequacy to be class representative and thus also brought this action for those similarly situated.

Mr. Binder's assertions predominantly focused on theories of recovery conventionally utilized in securities actions: Section 10(b) of the 1934 Act, including Rule 10b-5; aiding and abetting;[2] and a plethora of theories predicated upon state-law.[3]

Mr. Binder targeted AVBC itself;[4] its promoters and inside management: Thomas and Marie Gillespie, and

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[1] Mr. Binder prosecuted this action together with his spouse, Estelle. Mrs. Binder died during the pendency of this litigation and Mr. Binder evidently succeeded to her interest in the action.

[2] This allegation was voluntarily dismissed following the issuance of *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 114 S.Ct. 1439 (1994).

[3] Aside from Delaware law – applicable only to the alleged Breach of Fiduciary Duty count – the parties eventually concurred, and the district court agreed, that Idaho substantive law would apply to the claims predicated upon state law. (E.R., Vol. 9, Exhibit 53.1.) "E.R." identifies portions of the Petitioner's own excerpts of record (Circuit Rule 17-1.1) previously submitted to the Ninth Circuit.

[4] Curiously, Mr. Binder's counsel also vigorously prosecuted a *derivative* action, an action ostensively to *benefit* AVBC, against certain AVBC management in another action, the

Diane Karban; as well as its outside auditor, Deloitte & Touche. Binder also sought to affix liability to a number of "late comers" to the AVBC project, including outside director, Mr. Ian Wilson, part-time independent consultant, Mr. Cary Fitchey, and outside director (and AVBC President for a few months in 1994), Mr. Mark Stevens.

Binder's allegations largely consist of prolix and run-on sentences which basically attempted to establish Section 10(b) liability. These assertions presented both material misstatements as well as omissions as the purported basis for the claim. (Appendix C, First Amended Class Action Complaint.)

B. Course of Proceedings

Mr. Binder, a resident of the East Coast, commenced this action on March 4, 1994, in the District Court for the Central District of California. As the matter progressed, an involuntary petition for bankruptcy was filed against AVBC in early 1995.[5]

This action was eventually transferred to the District Court for the District of Idaho where it was assigned to Chief Magistrate Williams. Once "back on track," the court heard previously filed Rule 12(b) motions and

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Fite, et al. v. AVBC case. That action as directed against Mr. Wilson was dismissed. The nature of the dismissal was not readily apparent, but Binder did not dispute this circumstance.

[5] Mr. Binder's counsel actively participated in that AVBC bankruptcy on behalf of the plaintiffs who previously prosecuted the *Fite* derivative action. Following a perceived adverse ruling there, Binder tardily appealed to the district court, an appeal which was subsequently dismissed.

issued rulings accordingly which, *inter alia*, dismissed Mr. Binder's personal claim as directed against Messrs. Wilson and Fitchey. (Memorandum Opinion and Order, dated March 31, 1996, No. 64.) A class was conditionally certified. (Order of Court, August 8, 1996, E.R., Vol. 7.) Discovery ensued.

Eventually, the court conducted a hearing on subsequently filed Rule 56 motions asserted by some – but not all – defendants. The court ruled. That ruling was clarified by Order dated February 14, 1997. (Appendix B.) Judgments of Dismissal were then entered as to some – but not all – defendants. Those judgments were certified in accordance with Rule 54(b) on July 3, 1997. Mr. Binder appealed. Mr. Binder's non-appealed remaining claims primarily focused upon AVBC's promoters and its inside management and financial staff (the Gillespies, Karban, and Good); those claims are being held in abeyance. (Order, dated July 3, 1997, E.R. Vol. 9, Exhibit 53.B.) (Appendix 1.)

C. Operative Facts

1. Preliminary Factual Considerations

Though Binder has inundated his petition with various factual "rabbit trails," the facts truly necessary for resolving this petition are minimal. Of foundational import here is chronology: one will not understand ***why*** something happened until one understands ***when*** it happened. Here, Binder broadly references a number of assertions with little, if any, chronological foundation. He rarely coordinates these "facts" with the arrival and

departure of the targeted defendants or their actual conduct. One is left with the impression – from Binder – that *all* defendants *equally* participated in *each* alleged transgression. Just the opposite is true.

To illustrate, Binder intensely focuses on events occurring during 1990, 1991, and early 1992. Tales are told about acquiring public shells, broken promises, the failure to issue shares, the failure to report liabilities, wild-eyed press releases, defective product, etc. (*See, e.g.*, Petition, pp. 4-8.) What is missing from this litany of infamy is a careful enunciation concerning the Wilson defendants (Messrs. Wilson and Fitchey) – none of whom were at all involved with AVBC until the latter portion of 1992 at the earliest. Nothing Mr. Binder supposedly relied upon in procuring AVBC stock can be connected with the Wilson defendants, which is why Mr. Binder's individual Rule 10b-5 claim was dismissed early in this lawsuit. (Memorandum Opinion and Order, dated March 31, 1996, No. 64.) In truth, the serious transgressions he identifies were those committed, if at all, by those AVBC insiders remaining in the lawsuit who were present in 1990 and 1991: Gillespie and Karban. With this chronological note in mind, the following discussion will identify the facts pertinent to Messrs. Wilson and Fitchey. These facts underscore the correctness of the district court's Rule 56 determinations and thus illustrate the utter conventionality of the issues at hand.

2. General Corporate Overview

Plaintiffs Albert and Estelle Binder brought this class action suit in their individual capacity and on behalf of a

class of investors who purchased the AVBC stock between August 1, 1991, and February 28, 1994. AVBC is a Delaware corporation with its principal place of business in Idaho.

AVBC, founded in 1991, developed, manufactured, and distributed non-carbonated, flavored spring water beverages designed to appeal to both bottled water drinkers and "new age" beverage customers.[6] Since the commencement of this litigation, an involuntary petition for relief under Chapter 11 of the Bankruptcy Code was filed against AVBC. Prior to this development, AVBC's common stock was reported only in the over-the-counter ("OTC") market "pink sheets" until December 1993, at which time trading of AVBC's common stock commenced on the regional Boston Stock Exchange ("BSE"). AVBC's common stock does not trade, and has never traded, on a national exchange. As a result, an average weekly trading volume, which would have described the nature of AVBC's trading, never existed nor was established. There was never a significant number of securities analysts that followed and reported on AVBC's stock during the class period.

Named plaintiff Albert Binder is a former shareholder of AVBC who allegedly purchased 3000 shares of AVBC's common stock in September 1991 for approximately $4 a share, and sold the stock in December 1993 for approximately $1 a share. No part of this transaction was in any way connected with the Wilson defendants.

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[6] The "new age" beverage category includes beverages with lower calories, less caffeine, less alcohol, and fewer artificial ingredients.

3. The Wilson Defendants: Factual Specifics

a. As to Ian R. Wilson

Ian R. Wilson first heard of AVBC in 1992. (Deposition of Ian R. Wilson ("Wilson Depo."), p. 7, Ll. 19-23, E.R., Vol. 2, Exhibit 18.A.) Wilson met Mr. Gillespie for the first time in 1992. (Wilson Depo., p. 18, L. 2 – p. 20, L. 10, E.R., Vol. 2, Exhibit 18.A.) At that meeting, Wilson was very impressed with the concept of AVBC's spring water product and thought that the proposed names of some of the products were "very innovative and very appealing." (Wilson Depo., p. 20, L. 13 – p. 21, L. 25, E.R., Vol. 2, Exhibit 18.A.) Wilson joined the AVBC board in late 1992. (Wilson Depo., p. 17, L. 24 – p. 18, L. 1, E.R., Vol. 2, Exhibit 18.A.)

Wilson's position on the board was that of an outside director. (Wilson Depo., Exhibit 352, E.R., Vol. 2, Exhibit 18.E.) Wilson was listed as "additional director" separately from full time employees. (Wilson Depo., p. 204, Ll. 10-14; p. 256, Ll. 16-18, E.R., Vol. 2, Exhibit 18.A; Wilson Depo., Exhibit 349, E.R., Vol. 2, Exhibit 18.D "Statement for NASDAQ hearing committee" ("I am one of two outside directors of Aqua Vie Beverage Corporation and have been a director since October 1992.").) As an outside director, Wilson, a San Francisco resident, did not have access to information about AVBC's day-to-day operations. (Wilson Depo., p. 204, Ll. 3-14, E.R., Vol. 2, Exhibit 18.A.) Wilson's role as an outside director excluded any involvement with the "*Fite* litigation" or AVBC's NASDAQ application, and Wilson specifically asked that he not be involved in those areas. (Wilson Depo., p. 214, Ll. 17-24, E.R., Vol. 2, Exhibit 18.A.)

Regarding AVBC's dealings with its distributors (such as Golden Brands), Wilson testified, "I was a director to the company, not an active executive. I didn't get involved in things like that. And I don't know." (Wilson Depo., p. 304, Ll. 7-15, E.R., Vol. 2, Exhibit 18.B.) Wilson's role as a director was only to "look at the product development and the strategy." (Wilson Depo., p. 366, Ll. 9-13, E.R., Vol. 2, Exhibit 18.B.) Wilson testified that he had no knowledge of what AVBC was telling its distributors or other purchasers regarding the product's anticipated shelf life, noting that "There's simply no way a director gets involved in that level of activity." (Wilson Depo., p. 164, Ll. 8-12, E.R., Vol. 2, Exhibit 18.A.) Wilson also testified that "It is not the role of the director to interfere with operations." (Wilson Depo., p. 141, Ll. 21-22, E.R., Vol. 2, Exhibit 18.A.)[7]

Wilson did not involve himself in any matters that might have predated his October 1992 arrival on the board. (Wilson Depo., p. 218, Ll. 18-22, E.R., Vol. 2, Exhibit 18.A.) Wilson had not yet become involved with AVBC at the time AVBC first started producing its lightly flavored spring water product. (Wilson Depo., p. 311, Ll. 13-19, E.R., Vol. 2, Exhibit 18.B.) The production run that allegedly resulted in tinted product occurred prior to Wilson's involvement with AVBC. (Wilson Depo., p. 317, L. 17 - p. 318, L. 8, E.R., Vol. 2, Exhibit 18.B.) Wilson also

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[7] Mr. Wilson has held numerous directorships, including positions with Novell and Revlon. (*See* Wilson Depo., p. 213, Ll. 17-18, E.R., Vol. 2, Exhibit 18.W; Exhibit W to Affidavit of Counsel for Press Release of September 30, 1992, "Ian R. Wilson Joins Aqua Vie Beverage Corporation's Board of Directors.")

had no association with AVBC during the time the "Lopez transaction" transpired in 1991. (Wilson Depo., p. 371, Ll. 2-9, E.R., Vol. 2, Exhibit 18.B.)

During his involvement with AVBC, Wilson never saw a business plan or press release that he believed AVBC was distributing to prospective investors containing sales projections that he felt were overly optimistic. (Wilson Depo., p. 205, L. 25 – p. 208, L. 3, E.R., Vol. 2, Exhibit 18.A.) Wilson testified that he never had any reason to disbelieve Gillespie's representations in the press releases he saw. (Wilson Depo., p. 207, L. 20 – p. 208, L. 19, E.R., Vol. 2, Exhibit 18.A.) Wilson believed that Gillespie's sales projections for the second year of AVBC's operations were reasonable. Regarding this belief, Wilson was asked during his deposition whether he had any knowledge of any other beverage company that had introduced noncarbonated flavored water products that achieved sales of $100 million in the first five years of operation. Wilson answered in the affirmative and identified concrete examples of other beverage companies, including a company with sales of over a billion dollars within the first five years. (Wilson Depo., p. 257, L. 22 – p. 259, L. 25, E.R., Vol. 2, Exhibit 18.A.) Wilson had no knowledge of or involvement with AVBC accounting practices including the "booking" of sales of AVBC product in the first quarter of 1993. (Wilson Depo., p. 278, Ll. 2-8, E.R., Vol. 2, Exhibit 18.A.)

Wilson was never interested in buying and selling AVBC stock and he only purchased stock in order to become an AVBC board member. (Wilson Depo., p. 269, Ll. 3-6, E.R., Vol. 2, Exhibit 18.A.) Wilson never sold any shares of AVBC stock. (Wilson Depo., p. 233, Ll. 7-9, E.R.,

Vol. 2, Exhibit 18.A.) Wilson never exercised any options to purchase AVBC stock. (Wilson Depo., p. 233, Ll. 18-23, E.R., Vol. 2, Exhibit 18.A.) Wilson has never been paid any money by AVBC for the director services he provided. (Wilson Depo., p. 234, Ll. 2-5, E.R., Vol. 2, Exhibit 18.A.) Wilson never received any economic benefit from his relationship with AVBC except for some free (i.e., sample) water product. (Wilson Depo., p. 234, Ll. 8-18, E.R., Vol. 2, Exhibit 18.A.)

Wilson and Gillespie had a "falling out" around August 1994. (Wilson Depo., p. 185, L. 13 – p. 187, L. 13, E.R., Vol. 2, Exhibit 18.A.) This resulted from an accumulation of problems caused by Gillespie, including Gillespie's failure to satisfy certain obligations and Gillespie's actions regarding a $100,000 insurance company refund to AVBC. (Wilson Depo., p. 184, L. 14 – p. 186, L. 19, E.R., Vol. 2, Exhibit 18.A.) Wilson's directorship at AVBC was concluded when he allowed his directorship to expire during the 1993-1994 year. (Wilson Depo., p. 95, Ll. 4-13, E.R., Vol. 2, Exhibit 18.A.)

b. As to Cary S. Fitchey

Cary Fitchey "joined" AVBC in June 1992 as a Consultant. (Wilson Depo. Exhibit 347, E.R., Vol. 2, Exhibit 18.C (form 10k).) Gillespie retained Fitchey as a consultant. (Wilson Depo., p. 198, Ll. 8-10, E.R., Vol. 2, Exhibit 18.A.) Wilson testified that "Cary Fitchey is a consultant. He's not an operating man." (Wilson Depo., p. 201, Ll. 24-25, E.R., Vol. 2, Exhibit 18.A.) From Wilson's perspective, Fitchey was never on the AVBC board. (Wilson Depo., p. 171, Ll. 11-24, E.R., Vol. 2, Exhibit 18.A.)

The only contact that Cary Fitchey had with AVBC was as an outside consultant from the summer of 1992 through the summer of 1993. (Fitchey Depo., p. 14, L. 14 – p. 15, L. 6; p. 54, L. 17 – p. 56, L. 7, E.R., Vol. 2, Exhibit 18.Y.) Fitchey was never an officer, executive officer, or employee of AVBC. (Fitchey Depo., p. 270, Ll. 1-11, E.R., Vol. 2, Exhibit 18.Y.) He was never a member of the board of directors. (Fitchey Depo., p. 14, Ll. 20-21, E.R., Vol. 2, Exhibit 18.Y.) He never introduced himself or acted as the president of the company. (Fitchey Depo., p. 270, Ll. 12-17, E.R., Vol. 2, Exhibit 18.Y.) Also, Fitchey was never part of the management team of AVBC. (Fitchey Depo., p. 270, Ll. 18-20, E.R., Vol. 2, Exhibit 18.Y.) He was never involved in AVBC staff meetings. (Fitchey Depo., p. 335, L. 25 – p. 336, L. 1, E.R., Vol. 2, Exhibit 18.Y.) He did not have an assigned office or an assigned secretary in Ketchum, Idaho, the AVBC corporate offices. (Fitchey Depo., p. 58, L. 8 – p. 59, L. 21, E.R., Vol. 2, Exhibit 18.Y.)

Additionally, Fitchey had little, if any, involvement with the type of documentation relied upon by Binder. For example, Fitchey was not involved in preparing financial statements (Fitchey Depo., p. 80, Ll. 21-24; p. 267, L. 22 – p. 268, L. 24, E.R., Vol. 2, Exhibit 18.Y), press releases (Fitchey Depo., p. 66, L. 18; p. 66, L. 25 – p. 67, L. 10, E.R., Vol. 2, Exhibit 18.Y; p. 85, L. 5 – p. 86, L. 7; p. 279, L. 9 – p. 280, L. 24, E.R., Vol. 2, Exhibit 18.Y), or forecasts (Fitchey Depo., p. 271, Ll. 13-16; p. 273, Ll. 5-14, E.R., Vol. 2, Exhibit 18.Y).

The foregoing factual considerations underscore the factual propriety of the district court's ruling in this conventional legal setting.

ARGUMENT AND REASONS FOR DENYING THE PETITION

The Petition at best simply pays lip service to Rule 10's guideposts concerning certiorari. Mr. Binder, by bare conclusion, merely asserts that the district court's rulings somehow grossly deviated from accepted practice and thereby conflict with this Court's decisions in *Basic* and *Affiliated Ute*.[8] The Petitioner labors intensely to create the aura that this matter is one of national import, when in reality, it only represents an invitation for this Court to review conventional and discretion-laden determinations.

This Petition presents no more than the efforts of a disgruntled, but persistent, litigant who continues to quarrel with lower court rulings. Those rulings did not create "new law," but rather, conventionally applied existing law, and did so consistently with Rule 56. It is the Petitioner's own Rule 56 evidentiary failings together with the lower tribunals' application of well-settled law which engender the Petitioner's dissatisfaction. The correctness of these conclusions will be verified in the discussion which follows.

At the outset, it should be reiterated that both the Majority and the dissenting judge concurred as to several key points. First, they each agreed that because Mr. Binder lacked a claim against Wilson, summary judgment was properly granted in this regard. Second, they each affirmed the district court's evidentiary rulings – rulings which evaluated whether Mr. Binder, individually and as

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[8] Interestingly, the Petition is devoid of even an assertion – let alone a demonstration – that the Ninth Circuit's rulings engender a clash with the decisions of other Courts of Appeal.

a class representative, had discharged his various Section 10(b) burdens under Federal Rule of Civil Procedure 56 and *Celotex v. Catrett*, 477 U.S. 317 (1986). He did not, and no member of the panel disputed this point.

Consequently, as to this case, it is apparent that no basis exists for yet again reassessing the Rule 56 analysis already reviewed and affirmed by the Majority. The question thus presented concerns whether the Majority has somehow deviated from extant or controlling precedent.[9] Despite the noisy rhetoric of the Petitioner, the Majority apprehended the proper issue and applied the operative law to that issue – and did so well within the parameters of established precedent. This conclusion is confirmed by a number of considerations, including the fact that the dissent – invoked by the Petitioner – argued for a new rule to be embraced. Axiomatically then, the Majority, if it comported with extant precedent and thereby resisted creating a new expanded theory of liability, as urged by the dissent, did not commit error. Review, under such circumstances, is unwarranted.[10]

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[9] Notably, the Petitioner has not identified any conflict – real or apparent – among the Circuit Courts engendered by the Majority's incisive, yet conventional reasoning and opinion.

[10] Respondents Wilson and Fitchey, rather than wearying the Court's eyes by reiterating Respondent Deloitte's argument which similarly opposes granting the Petition, will instead simply by this reference, acknowledge, adopt, and incorporate Deloitte's substantive points.

I.

A PROPER READING OF *AFFILIATED UTE* VERIFIES THE CORRECTNESS OF THE MAJORITY'S REASONING AND CONCLUSIONS

Distilled to its essence, Binder seeks the wholesale jettisoning of all evidentiary hurdles facing a claimant who has alleged fraud in connection with a purchase or sale of securities. He contends that in reality, though apparently unrecognized for years, *Affiliated Ute Citizens v. United States*, 406 U.S. 128 (1972), essentially dispensed with a claimant's proof concerning reliance by creating a sweeping presumption of reliance – available irrespective of the nature of the fraud claim. Petitioner errs.

First, Mr. Binder's position is counter-intuitive. If, as he contends, *Affiliated Ute* provided a presumption for every case alleging securities fraud, then the Court's subsequent decision in *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988), is essentially surplusage. If "logic" requires negating the distinction between "omission cases" and "misrepresentation cases," then this Court behaved "illogically" because *Basic* refused to apply *Affiliated Ute* as broadly or as categorically as Binder now urges. Moreover, this Court did not view *Affiliated Ute* as squarely answering the question posed in *Basic*. Therefore, the supposed breadth of *Affiliated Ute* disappears when viewed through later precedent. Simply put, if Binder's thesis is correct, then *Basic* missed the analytic boat altogether.

Second and more critically, Mr. Binder fails to address the factual context underlying both *Affiliated Ute* and *Basic*. Understanding the unique factual contexts of

both decisions provides guidance for understanding the legal rationales of those decisions. These factual distinctives help explain the Court's recognition and tailoring of presumptions applicable in certain – but not all – situations. The Petitioner fails to consider these crucial factual distinctives and thereby misconstrues the utility and function of these presumptions.

In *Affiliated Ute*, the transaction was a personal, non-public matter essentially *involving a fiduciary*. *Affiliated Ute*, 406 U.S. at 153-54. The seller in that case functioned as a fiduciary and therefore in the nature of the case, possessed a duty to speak. From the purchaser's perspective, his seller was inherently an "object of trust," a fiduciary. It was on this basis that the Court, understanding that the allegations there primarily concerned material omissions, recognized a presumption of reliance.

Purchasers reasonably rely on fiduciaries to disclose material information. When a fiduciary is silent, the purchaser can rightly rely on that silence. This is because the silent party, since he is a fiduciary, *already owed* the purchaser material disclosure. A purchaser is, by definition, entitled to rely on his fiduciary throughout the transaction.

In *Basic* however, there was no involvement by a personal fiduciary, that is, one who by definition is charged with an obligation to speak. Rather, in *Basic*, the transaction was a public purchase which occurred in a public market. Absent a fiduciary's involvement as in *Affiliated Ute*, there was no obvious "object of trust."

In response to this circumstance, the Court did not, as Mr. Binder urges, simply expand *Affiliated Ute* to supply a presumption. Rather, the Court first needed to determine to what extent a purchaser may reasonably rely on a non-fiduciary. The question presented was thus whether an impersonal market could be a proper "object of trust." In answering this question, *Basic* determined that an impersonal market could be an "object of trust," but only:

> [B]ased on the hypothesis that, in an ***open*** and ***developed securities market***, the price of a company's stock is determined by the available material information regarding the company and its business.

Basic, 485 U.S. at 241 (emphasis added). Just any market could not properly be considered an "object of trust" like the fiduciary in *Affiliated Ute*. Consequently, *Basic* established some "sideboards" for determining just how a public securities market could be an object of trust – analogous to a fiduciary – which reasonably could permit a presumption of reliance. Stated differently, a market is not, by definition, trustworthy, and accordingly, *Basic* explored just when a market could be deemed sufficiently trustworthy in order to permit a presumption of reliance.

In contrast, *Affiliated Ute*'s transaction involved a fiduciary, which by definition is an object of trust. And, because a fiduciary possesses a duty to speak, *Affiliated Ute* recognized a presumption in that context, especially where the gravamen involved "primarily a failure to disclose." *Affiliated Ute*, 406 U.S. at 153. *Basic* addressed a different question.

Accordingly, because *Affiliated Ute* and *Basic* addressed two different questions, the fact that they presented two different, though related, answers to those questions should be recognized. *Affiliated Ute* does not apply here therefore for two primary reasons: (1) this case does not involve a personal transaction involving a fiduciary; and (2) this case does not primarily involve material omissions.

Accordingly therefore, Mr. Binder, by failing to appreciate the actual issues facing the Court in these two decisions, has blurred the important analytical distinctiveness of each decision. He, by misconstruing both decisions, has attempted to artificially create a conflict, when in reality, none exists. Both the district court and the Majority presented a more informed analysis, an analysis consistent with both *Affiliated Ute* and *Basic*, as well as their progeny. Accordingly therefore, because the Majority simply applied the operative rule to the facts of this specific case, no basis exists for granting the Petition.

II.

THE CLASS'S EXTANT EVIDENTIAL FAILURES UNDER RULE 56 AND *CELOTEX* RENDERED *BASIC*'S FRAUD ON THE MARKET PRESUMPTION INAPPLICABLE TO THIS ACTION

Mr. Binder's next contention centers on the Majority's assessment of *Basic*'s fraud on the market presumption as applied to this case. In particular, Mr. Binder contends that both the district court and the Majority improperly narrowed *Basic*'s applicability by investigating whether the AVBC stock at issue traded upon an

efficient market. This contention distorts *Basic*'s teaching in several respects. In reality, it is Mr. Binder who has advanced a thesis which contradicts *Basic*. This is true for several reasons.

First, Mr. Binder contends that the Majority has contradicted *Basic* because it affirmed the district court's consideration of various factors in determining whether the fraud on the market presumption was available *vis-a-vis* AVBC stock. This assertion is fallacious since it attempts to create error by equating *precision* with *contradiction*.

Basic, in articulating the predicate for applying the fraud on the market presumption, noted that the presumption is available in an open and developed market. *Basic*, 485 U.S. at 241, 242. Later cases, in following *Basic* and interpreting this point, developed criteria for actually applying this presumption. This later development, as expressed, for example, in *Cammer v. Bloom*, 711 F.Supp. 1264 (D.N.J. 1989) simply reflects *greater precision* in relation to applying the *Basic* standard – not a *contradiction* of it.

To illustrate: To say that *"the **black** cat is on the **round** table"* is not to contradict the statement that *"the cat is on the table."* Mr. Binder has claimed error by confusing increased *precision* with *contradiction*. In the same way, the decisions following *Basic*, such as *Cammer*, which grapple with applying Basic's "open and developed" market standard are simply explicating this standard; they are not contradicting or abrogating it. An open and developed market will usually reflect – at least to some degree – the criteria recognized by *Cammer*. Just as later decisions

developed Fifth Amendment protections following *Miranda*'s lead, later courts, including the Majority, did the same thing *vis-a-vis Basic*. This sort of legal analysis and methodology reflects fundamental jurisprudence – not error of great national import.

Second, Mr. Binder continues to misapply the plain teaching of *Basic* in urging that the Petition be granted. *Basic*, in explaining the fraud on the market presumption, stated that the presumption is available because:

> [a]n investor who buys or sells stock ***at the price set by the market*** does so in reliance on the integrity of that ***price***.

Basic, 485 U.S. at 247 (emphasis added). Consequently, the market that sets the price must be deemed "efficient." *Basic*, 485 U.S. at 248 n.27. Note carefully: the proper inquiry focuses on the ***price*** of the ***particular stock*** in question – ***not*** simply the ***market*** which offers the stock for sale or purchase.

Plainly then, the district court and the Majority were precisely following *Basic* when they evaluated whether, under Rule 56 and *Celotex*, Mr. Binder had proffered sufficient evidence which depicted a genuine issue of material fact ***as to the price set by the market for AVBC stock***. He did not.

Undisputedly, the AVBC stock traded on the "over the counter" ("OTC") pink sheets, mere compilations which did not establish any price for a given stock. Rather, the pink sheets at issue here simply reported "bid" and "ask" prices; the actual ***price*** of the AVBC stock was never actually ***set by*** this market as required by *Basic*. Thus, under *Basic*, there could be no "open" and

"developed" market as to AVBC stock – on this factual record – because the market did not set the stock price.[11]

Put differently, Mr. Binder has wrongly asserted that it is the ***exchange*** on which the stock sells – as opposed to the ***price-setting market*** of the ***actual stock*** in question – which gives rise to the presumption.[12] Here, the district court and the Majority did precisely what *Basic* required: evaluate whether, in this particular case as to the price of this particular stock, the market was, to use *Basic*'s shorthand, "efficient." Given the decided absence of genuinely

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[11] Mr. Binder badly mischaracterizes the Majority when he implies that the Majority has determined that under no circumstance could the OTC market be deemed efficient. In reality, the Majority, in attempting to contextualize its discussion, noted that some federal courts have in fact held that the OTC market is incapable of being efficient. *Binder*, slip op. at 3 and 4. The Majority, however, did not so hold, and, in fact, conducted an assessment consistent with *Basic* in this regard and predicated upon the extant factual record.

[12] Indeed, Binder actually argues for a formalistic bright line test which would declare that a purchaser of any stock traded by any SEC reporting company may by definition avail himself to the fraud on the market presumption. This invitation travels wells beyond *Basic* which requires that the market – in the particular stock at issue – be open and developed, i.e., one that actually sets the securities' price. These condition precedents did not exist here, and Binder adduced no competent evidence (*see* Rule 56(e)) engendering a genuine triable issue as to them. Summary judgment was manifestly proper given this material evidentiary defect, a defect which even the dissent acknowledged.

controverted factual issues present in the record, summary judgment was properly granted to Deloitte, and Messrs. Wilson and Fitchey.[13]

III.

PETITIONER'S MISCELLANEOUS POINTS INVOKED AS GROUNDS FOR ACCEPTING THE PETITION PRESENT NOTHING MORE THAN A QUARREL WITH THE LOWER COURTS' DISCRETION-LADEN DETERMINATIONS

A. As to Class De-Certification

The Petitioner asserts – like a Y2K doomsayer – that the district court's rulings signal the death knell to all class actions involving market-related securities transactions. This is unpersuasive for several reasons. First, this assertion misconstrues the district court's actual rulings. The district court announced no sweeping rule that categorically – in advance of actual considerations – bars class certification in these types of cases. Instead, the court simply determined that ***in this case*** based upon the ***extant record,*** this particular putative class could not satisfy the reliance requirement in this particular Rule 10b-5 setting, and thus, reliance would need to be individually proved. Based upon a mix of considerations, the

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[13] Recall that both the Majority and the dissent affirmed the district court's evidential determinations in this regard. *Cf., Goldkrantz v. Griffin, et al.*, 1999 U.S. Dist. LEXIS 4445, Fed.Sec.L.Rep. (CCH), ¶ 90,462 (Defendants' expert witness established that drop in stock's price unrelated to Defendants' alleged conduct).

court determined, in its discretion, that de-certification would be appropriate.

Second, and confirming this first point, is the fact that the Court of Appeals' decision has not been embraced as a panacea for defendants named in securities litigations. Indeed, *Binder* has only been minimally cited, and in those cases, none of the supposed earth-shattering repercussions – forecasted by Mr. Binder – were touted or even commented upon.

B. As to Supplemental Jurisdiction

The Petition similarly identifies, as a basis for granting the Petition, the district court's discretionary ruling refusing to exercise supplemental jurisdiction over certain state law claims. The district court, however, in viewing the totality of the record, declined supplemental jurisdiction in accordance with 28 U.S.C. Section 1367(c). Again, this point simply presents the Petitioner's quarrel with a routine discretionary ruling, a ruling utterly devoid of national import, which in no way supports the granting of the Petition.

C. As to Rule 56(e) Evidentiary Rulings

The district court's analysis makes clear that a large factor contributing to its rulings was the decided factual inadequacy of Mr. Binder's evidential proffer. Indeed, the district court noted that, as to certain matters, Mr. Binder's proffer "failed miserably" to meet the rigors of Rule 56(e):

> Plaintiff moves for clarification and/or reconsideration of the Court Order striking the declarations of Thomas Tollefson. (Dkt. #391.) The Order of February 14, 1997, struck the Tollefson declarations submitted by Plaintiffs both in support and in opposition to various motions for summary judgment. ***In finding that the declarations failed miserably in meeting the requirements of Rule 56(e), the Court struck the declarations because of lack of foundation as to personal knowledge and because the declarant's expertise and credentials had not been established as to the opinions he sought to assert.***

App. 1, 26 (emphasis added).

Mr. Binder's dissatisfaction with certain Rule 56 evidentiary rulings therefore manifestly fails to supply grounds for granting the petition. Indeed, even the dissenting judge affirmed the district court as to these matters. Again, by clamoring about Rule 56 evidential rulings, the Petitioner underscores the utter conventionality of the decision below. This case does not present any critical question of national import.

IV.

AS TO THE PETITION'S MISSTATEMENTS

The Petition does contain several misstatements. With intended brevity, these misstatements, as related to Messrs. Wilson and Fitchey include:

- The firm of Elam & Burke, P.A. represents only Messrs. Wilson and Fitchey in this proceeding, not Mr. Stevens

- Petitioner's repeated references that the Golden Brands distributor contract was terminated in 1991, is incorrect; AVBC and Golden Brands continued their relationship until well into 1994

- The Petition asserts that the AVBC product was "defective" when in reality, there was a shelf-life adjustment that needed to occur, an adjustment which was subsequently implemented

- Appendix B bears the incorrect date of the district court's February 14th Decision. The proper year is 1997, not 1999.

CONCLUSION

This Petition at best presents a factual quarrel with conventional discretion-laden rulings issued under well-settled precedent, Rule 56, and 28 U.S.C. § 1367. This Petition in no way presents any issue of national significance, nor does a conflict of precedent exist which in any way requires this Court's guidance. Accordingly, Mr. Binder's Petition should be politely, but firmly, denied.

DATED this 21st day of January, 2000.

ELAM & BURKE, P.A.

JEFFERY J. VENTRELLA, Of the Firm
Attorneys for Respondents
Wilson and Fitchey

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ALBERT AND ESTELLE BINDER, in their individual capacities and on behalf of one or more classes of persons similarly situated, Plaintiffs, vs. THOMAS GILLESPIE, MARIE MULLEN GILLESPIE, IAN R. WILSON, T. GORDON SIM, DIANE L. KARBAN, DIANE KARBAN BARKER, CARY S. FITCHEY, LEE STRADER, JOHN A. GOOD, ROBERT BAHOSHY, MARK L. STEVENS, AQUA VIE BEVERAGE CORPORATION AND DELOITTE & TOUCHE, Defendants.	Case No. CV 94-0528-S-MHW **ORDER**

Currently pending before the Court are the following motions:

(1) Plaintiff's motion to strike the answer of Defendant Deloitte & Touche (Dkt. #351) filed February 6, 1997;

(2) Plaintiff's motion for order that complaint plead punitive damages (Dkt. #363) filed February 11, 1997;

(3) Defendant Karban's motion to dismiss second cause of action in the first amended complaint (Dkt. #370) filed February 18, 1997;

(4) Plaintiff's motion for reconsideration of Court's order imposing sanctions (Dkt. #383) filed March 21, 1997;

(5) Plaintiff's motion for entry of final judgment (Dkt. #385-1) filed March 22, 1997;

(6) Plaintiff's motion for certification of appeal under 28 U.S.C. § 1292(b) (Dkt. #285-2) filed March 22, 1997;

(7) Plaintiff's motion to clarify or for reconsideration of the admissibility and the Court's reliance on Defendant Deloitte and Touche's two expert reports and the Wright Houlihan report for purposes of the Court's ruling on the Defendants' motions for summary judgment (Dkt. #287) filed March 22, 1997;

(8) Plaintiff's motion for order and entry of judgment on Binders' individual claims against Defendant Gillespies following entry of default (Dkt. #389) filed March 22, 1997;

(9) Plaintiff's motion to clarify or for reconsideration of the Court's order striking the declaration of Thomas Tollefson (Dkt. #391) filed March 22, 1997;

(10) Defendants Wilson, Sim, Stevens and Fitchey motion for clarification of summary adjudication and entry of judgment (Dkt. #393) filed March 21, 1997;

(11) Defendant Deloitte & Touche's motion for summary judgment against Albert Binder (Dkt. #396) filed March 21, 1997;

(12) Defendant Good's motion to dismiss (Dkt. #402) filed March 24, 1997;

(13) Plaintiff's motion to strike Defendant Deloitte & Touche's expert reports and materials submitted in support of its motion for summary judgment (Dkt. #415) filed April 8, 1997.

On June 19, 1997, the Court conducted a hearing, has fully reviewed the motions and related pleadings and is now sufficiently prepared to issue a ruling in this matter.

I.

BACKGROUND

On February 14, 1997, the Court issued an Order which concluded that the Plaintiffs, as a class, were unable to prove essential elements of its Section 10b and Rule 10b-5 claims. (Dkt. #366). As a result, the Court found that the Plaintiffs were unable to sustain the class status of the action because individual issues predominated over common ones. The Court found as a matter of law that the Defendants were entitled to summary judgment regarding Count One of the class complaint. Moreover, the Court declined to exercise supplemental jurisdiction over the related state law class claims. As a result of the class decertification, the only remaining claims are the individual federal and state claims of the named Plaintiff, Albert Binder ("Binder").

The Court will first address the parties' motions to dismiss and/or for summary judgment. Second, the Court will take up the various motions for clarification and/or reconsideration. Third, the Court will address the motions regarding certifying the case for appeal and finally any miscellaneous motions.

II.

MOTIONS TO DISMISS AND/OR FOR SUMMARY JUDGMENT

Various Defendants advance dispositive motions aimed at the merits of Binder's individual claims. Defendant Karban moves to dismiss Count Two of the complaint lodged against her and also petitions the Court to decline to exercise supplemental jurisdiction over the remaining state law claims. (Dkt. #370). Defendant Good moves to dismiss the complaint for failure to state a cause of action. (Dkt. #402). Defendants Wilson, Sim, Stevens and Fitchey move for clarification regarding issues of summary adjudication and entry of judgment. (Dkt. #393). Finally, Defendant Deloitte & Touche moves for summary judgment against Binder's individual claims. (Dkt. #396).

Legal Standards:

1. Rule 56 Motion for Summary Judgment:

When reviewing a motion for summary judgment, the proper inquiry is whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine

issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c) (1993). A moving party who does not bear the burden of proof at trial may show that no genuine issue of material fact remains by demonstrating that "there is an absence of evidence to support the non-moving party's case." *Celotex Corp v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party meets the requirement of Rule 56 by either showing that no genuine issue of material fact remains or that there is an absence of evidence to support the non-moving party's case, the burden shifts to the party resisting the motion who "must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). It is not enough for the [non-moving] party to "rest on mere allegations of denials of his pleadings." *Id.* Genuine factual issues must exist that "can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party." *Id.*, at 250.

"When determining if a genuine factual issue . . . exists, . . . a trial judge must bear in mind the actual quantum and quality of proof necessary to support liability." *Id.*, at 249-250. "The mere existence of a scintilla of evidence in support of the [defendant's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [defendants]." *Id.*

The Ninth Circuit has consistently applied the standard for granting summary judgment. *Musick v. Burke*, 913 F.2d 1390 (9th Cir. 1990); *Pelletier v. Federal Home Loan Bank*, 968 F.2d 865 (9th Cir. 1992); *Bieghler v. Kleppe*, 633 F.2d 531 (9th Cir. 1980).

In determining whether a material fact exists, facts and inferences must be viewed most favorably to the non-moving party. To deny the motion, the Court need only conclude that a result other than that proposed by the moving party is possible under the facts and applicable law. *Aronsen v. Crown Zellerbach,* 662 F.2d 584, 591 (9th. Cir. 1981).

The Ninth Circuit has recently emphasized that summary judgment may not be avoided merely because there is some purported factual dispute, but only when there is a "genuine issue of material fact." *Hanon v. Dataproducts Corp.,* 976 F.2d 497 (9th Cir. 1992).

In order to withstand a motion for summary judgment, the non-moving party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

British Motor Car Distrib. Ltd. v. San Francisco Automotive Indus. Welfare Fund, 882 F.2d 371 (9th Cir. 1989).

2. Rule 129(b) Motion to Dismiss:

The purpose of a Rule 12(b)(6) motion to dismiss is to test the sufficiency of the claim for relief by addressing itself solely to the failure of the complaint to state a claim. When the court is testing the sufficiency of the claims for

relief, the complaint should be construed in a light most favorable to the plaintiff and its allegations taken as true. *Scheuer v. Rhodes,* 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); *Church of Scientology of Ca. v. Flynn,* 744 F.2d 694, 696 (9th Cir. 1984). The complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle plaintiff to relief. *Conley v. Gibson,* 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Reddy v. Litton Industries, Inc.,* 912 F.2d 291, 293 (9th Cir. 1990). The issue is not whether the plaintiff will ultimately prevail or is likely to prevail, but whether the Plaintiff is entitled to offer evidence to support the claim. *Scheuer, supra.*

In reviewing the allegations of a complaint pursuant to a 12(b)(6) motion raised by a Defendant, legal conclusions, deductions or opinions couched as factual allegations are not given the presumption of truthfulness. 2A *Moore's Federal Practice* § 12.07 (1994). *See e.g. Briscoe v. Lahue,* 663 F.2d 713 (7th Cir. 1981) (Conclusory allegations of a conspiracy without any supporting facts are insufficient to withstand a motion to dismiss); *Davidson v. Georgia,* 622 F.2d 895 (5th Cir. 1980) (Where allegations of unconstitutionality were wholly conclusory, dismissal was proper.); *Mitchell v. Archibald & Kendall, Inc.,* 573 F.2d 429 (7th Cir. 1978) (Dismissal upheld since legal conclusions drawn from pleaded facts are not presumed to be true.).

Discussion

1. Defendant Karban's Motion to Dismiss

Defendant Karban moves pursuant to Rules 12(b)(6) and 15(a) of the Federal Rules of Civil Procedure for an order dismissing Count Two of the amended complaint[1] and requests that the Court decline to exercise supplemental jurisdiction over the remaining state causes of actions against her. Plaintiff opposes the motion, arguing that the Court's Order of February 14, 1997, stated it would retain jurisdiction over Count Two as it pertains to Karban.

In its Order dated November 25, 1996, the Court addressed the Plaintiffs' motion to amend the complaint. (Dkt. #213). The Court allowed the Plaintiffs to amend its complaint regarding only certain specified areas. The Court stated that:

> Plaintiffs, however, will not be allowed to file an amended complaint including: (1) additional claims against Defendant Karban under Section 10b and Rule 10b-5, and section 20A of the Securities Exchange Act of 1934, (2) a separate claim for racketeering under the Idaho Racketeering Act against Defendant Karban, (3) a separate claim against all Defendants for aiding and abetting under Idaho state law, nor (4) a separate conspiracy claim against all the Defendants.

(Dkt. #213 at 9).

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[1] Count Two of the first amended complaint alleges that Karban violated "insider trading" provisions of the federal securities laws including Section 10b, Rule 10b-5 and Section 20A.

Thus, the Court granted the Plaintiffs' motion to amend subject to the terms and conditions outlined in the Order. The Court concluded that the claims lodged against Karban could not proceed because the allegations were untimely and were not among those amendments discussed between the court and the parties at a June 28, 1996, hearing.[2] The Court found that the Plaintiffs could have forwarded those claims at the time the complaint was filed and that to allow the amendment against Karban was prejudicial and justice did not so require. When Plaintiffs lodged and filed the first amended complaint, it inadvertently included the cause of action under Section 10b, Rule 10b-5 and Section 20A against Karban.[3] This was error. As a result of that cause of action being erroneously included in the amended complaint, the Court concluded in its Order of February 14, 1997, that the claim against Defendant Karban existed after the class was decertified. This was error.

The second cause of action should not have been considered by the Court because it should not have been included in the complaint.[4] The Court will rectify the

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[2] At a hearing conducted June 28, 1996, the Plaintiff indicated which portions of the complaint it sought to amend. The Court allowed the Plaintiff to submit a proposed amended complaint based on the Plaintiff's statements. The Court received the proposal and on November 25, 1996, ruled on the Plaintiff's motion to amend.

[3] The aiding and abetting cause of action in Count Five against all Defendants was mistakenly included as well.

[4] The same reasoning applies to Count Five for aiding and abetting liability against all the Defendants. Therefore, that Count will be stricken from the first amended complaint.

error at this time, dismissing Count Two from the amended complaint in its entirety. At this time the only claims remaining against Karban are Binder's individual Count One claim and the related state law claims.

2. Defendant Good's Motion to Dismiss

Defendant John Good moves to dismiss the Plaintiff's first amended complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Dkt. #402). Good argues that because the Court decertified the class and declined to exercise supplemental jurisdiction over the state law class claims, it should now rule that Albert Binder as an individual has failed to state a claim against him. Good asserts that there is no allegation in the complaint that he materially aided in making material misrepresentations or that he is connected with any deficiencies in AVBC's forecasting, sales, costs of sales, profit margin, cash flow, distribution network, general and administrative costs, and sales and earnings projections. Good additionally asserts that the Plaintiff has failed to allege sufficient facts showing that he was in a position to control the management of the company, set company policy, keep company books, prepare and sign the company prospectus, prepare quarterly or annual reports, issue press releases, sign registration statements, or sell or offer to sell securities. Finally, Good asserts that the Plaintiff has failed to allege that he made any material misrepresentations to the individual Plaintiff, Albert Binder.

The Plaintiff opposes the motion to dismiss, asserting the dual argument that not only is the motion improper

because Good filed an answer to the first amended complaint, but also that the complaint properly states causes of action upon which relief can be granted. The record reflects that Good filed an amended answer to the first amended complaint on February 11, 1997, and that this filing pre-dated the filing of the motion to dismiss. (Dkt. #357). Therefore, the Court finds that the Rule 12(b)(6) motion is improper at this stage because the movant previously filed an answer to the amended complaint. Thus, without reaching the merits of the motion to dismiss, the Court looks to Rule 12(b) and Rule 56(c) to see if converting the motion to dismiss to one for summary judgment is appropriate.

Based on the record and the parties' submissions, the Court concludes that Good has failed to show as a matter of law that he is entitled to summary judgment. Genuine issues of material fact exist regarding Good's conduct and knowledge as to pertains to the allegations lodged in the amended complaint. Therefore, Good's motion will be denied.

3. Wilson Defendant's Motion for Clarification Regarding Summary Adjudication

The Wilson Defendants move for clarification and summary adjudication regarding Binder's individual claims against them. (Dkt. #393). The Wilson Defendants contend that based on the Court's prior rulings, Binder's individual claim alleged in Count One against Defendant Stevens should be dismissed. In addition, they contend that no genuine issues of material fact exist concerning

Binder's individual claim in Count One against Defendant Sim and that claim should be dismissed as well. If the Court grants the requested relief, the Wilson Defendants would then request that the Court decline to exercise supplemental jurisdiction over the remaining state law claims and enter an entry of judgment pursuant to Rule 54(b) enabling the Plaintiff to appeal the ruling as a matter of right.

The Court has already determined that Binder's individual section 10b claim cannot stand against Defendants Wilson and Fitchey. On March 31, 1996, the Court dismissed Count One against those Defendants ruling that:

> Defendant Wilson did not become a member of the Board of Directors until September of 1992. The Complaint does not allege involvement on his part prior to the time Plaintiffs purchased their stocks in 1991. Similarly, the Complaint does not allege that Defendant Fitchey was involved in the allegedly wrongful conduct that occurred in 1991. Therefore, as a matter of law, the named Plaintiffs cannot assert Count One against Defendants Wilson and Fitchey, and Count One must be dismissed as it relates to the named Plaintiffs and Defendants Wilson and Fitchey.

(Dkt. #64 at 22-23).

The complaint alleges that Stevens became a director of AVBC in approximately July of 1993, and became President and Chief Executive Officer in January of 1994. (Dkt. #217 at 30). There is no allegation in the complaint and none in the record which indicates that Stevens had any involvement with AVBC prior to September 1991, the

time at which Plaintiff purchased his stock. Therefore, for the same reasoning as applies to Defendants Wilson and Fitchey, the Court finds as a matter of law that the Plaintiff cannot assert an individual claim based on Count One against Stevens and that the claim should be dismissed.

However, the Court cannot reach the same conclusion concerning Defendant Sim. The complaint alleges that beginning in July 1991, Sim was a special advisor to AVBC and acted as a quasi officer/director. This activity would predate the purchase of stock by the Plaintiff. Therefore, as a matter of law the Court cannot state that the Plaintiff's individual Count One claim against Sim should be dismissed. The Court concludes that the parties' submissions create a genuine issue of material fact regarding the scope and extent of Sim's involvement with AVBC.

The Court will decline to exercise supplement jurisdiction over the state law claims relating to Defendant Stevens, but will retain jurisdiction over the state law claims relating to Defendant Sim. Pursuant to Rule 54(b), the Court will grant final judgment as it pertains to Defendants Wilson, Stevens and Fitchey on all federal and state counts, both individually and as a class, as alleged in the first amended complaint. No just reason for delay exists as to this entry of judgment.

4. Defendant Deloitte & Touche's Motion for Summary Judgment

Defendant Deloitte & Touche moves pursuant to Rule 56(c) of the Federal Rules of Civil Procedure for summary judgment against Albert Binder's individual claims and

seeks to dismiss the complaint in its entirety.[5] Deloitte asserts that no triable issues of material fact exist with respect to certain elements of Binder's individual claim under section 10b and Rule 10b-5 and that the Court should decline to exercise supplemental jurisdiction over the remaining state law claims.

Deloitte argues that Binder's Section 10b and Rule 10b-5 claims should be dismissed because he purchased his AVBC stock before any alleged misrepresentation or omission by Deloitte was made. Thus, Deloitte contends that Binder will be unable as a matter of law to prove transaction and loss causation, essential elements of a Section 10b and Rule 10b-5 claim. In support of its position, Deloitte points to two facts which it contends show that Binder could not have relied on any alleged misrepresentation or omission by Deloitte. First, Deloitte points out that Binder purchased his stock in September 1991. Second, Deloitte contends that the first public disclosure of any AVBC financial statement audited by Deloitte and alleged to contain any misrepresentation or omission occurred on October 22, 1991. Deloitte asserts that both facts are uncontradicted and undisputed in the record.

To prove a claim for section 10b of the Securities Exchange Act and rule 10b-5 a plaintiff must show:

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[5] Defendant Karban joined in Deloitte's motion for summary judgment. (Dkt. #417). The Court concludes, however, that the factual and legal basis for Deloitte's motion is substantially different than that which would support Karban's motion. The Court finds that Karban has failed, at this time, to provide a sufficient basis for the Court to rule on her motion for joinder or for summary judgment.

> (1) a misrepresentation or omission or other fraudulent device; (2) a purchase or sale of securities in connection with the fraudulent device; (3) scienter by defendant in making the misrepresentation or omission; (4) materiality of the misrepresentation or omission; (5) justifiable reliance by plaintiff (or due diligence against it); and (6) damages resulting from the fraudulent device.

See, Basic v. Levinson, 485 U.S. 224, 108 S.Ct. 978, 99 L.Ed.2d 194 (1988); *McCormick v. Fund America Companies,* 26 F.3d 869 (9th Cir. 1994); *Monroe v. Hughes,* 31 F.3d 772 (9th Cir. 1994); *Warren v. Reserve Fund, Inc.,* 728 F.2d 741 (5th Cir. 1984) *reh den.* 734 F.2d 1479 (1984); *Marksman Partners L.P. v. Chantal Pharmaceutical Corp.,* 927 F.Supp. 1297 (C.D.Cal. 1996); *Robert Freedman v. Louisiana-Pacific Corp.,* 922 F.Supp. 377 (D.Ore. 1996).

To validly assert a claim under Section 10b and Rule 10b-5 based on material omissions and misrepresentations, the Plaintiff must prove both transaction causation, that the violations in question caused the Plaintiff to engage in the transaction, and loss causation, that the misrepresentation or omissions caused the harm. *See, McGonigle v. Combs,* 968 F.2d 810, 820 (9th Cir. 1992); *Securities Investor Protection Corp. v. Vigman,* 908 F.2d 1461 (9th Cir. 1990). Moreover, transaction and loss causation are "dual and independent requirements analogous to the basic tort principle that a plaintiff must demonstrate both 'but for' and proximate causation." *McGonigle,* 968 F.2d at 821.

To demonstrate transaction causation, the plaintiff must prove that the violations alleged against the defendant caused the plaintiff to engage in the transaction. In

other words, a plaintiff must demonstrate that he relied on the alleged misrepresentations when he entered into the transaction which caused the harm. *See, Hatrock v. Edward D. Jones & Co.*, 750 F.2d 767, 773 (9th Cir. 1984). Thus, it goes without saying that in order to be harmed in a stock purchase transaction, the alleged misrepresentations and/or omissions must have been made before the stock was purchased. If not, the purchaser will be unable as a matter of law to show transaction causation. *See, Roberts v. Peat, Marwick, Mitchell & Co.*, 857 F.2d 646, 651 (9th Cir. 1988) (the actionable conduct must occur before the investors become purchasers of securities).

Deloitte contends that because no public dissemination or disclosure of information by Deloitte regarding AVBC occurred until after Binder purchased his stock, Binder will be unable to show that any of the alleged misrepresentations or omissions induced him to buy. The record is clear that the first public disclosure of financial statements audited by Deloitte was the Form 8 Amendment filed with the Securities Exchange Commission ("SEC") on October 22, 1991, which contained the Deloitte audit report on AVBC's December 31, 1990, financial statements. The Plaintiff has previously argued and continues to argue that Deloitte prepared and/or reviewed AVBC's First and Second Quarter 1991 10-Qs which were filed with the SEC on September 16, 1991. However, the Court previously concluded and again reaches the conclusion that "no persuasive evidence

[exists] in the record that Deloitte reviewed or audited those reports." (Dkt. #366 at 31).[6]

Based on the record and the materials submitted by the parties, the Court concludes that no genuine issues of material fact exist regarding the issue of transaction causation. The record clearly shows that Binder could not have relied on any alleged misrepresentation or omission by Deloitte at the time he purchased his stock because Deloitte had not disseminated or disclosed any audited reports at that time.[7] For this reason, Deloitte is entitled

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[6] The only allegations against Deloitte in the first amended complaint pertaining to unaudited financial statements include the allegation that Defendant Diane Karban "was the person at the Company who was *primarily* responsible, with Deloitte's assistance and advice, for the actual preparation of the Company's audited year-end and unaudited quarterly financial statements." (Dkt. #217 at 19) (emphasis added). In addition, the complaint alleges that Deloitte "regularly reviewed and commented upon the Company's proposed quarterly reports to the SEC, including unaudited financial statements, on Form 10-Q before they were filed with the SEC and other wise publicly disseminated." *Id.* at 40. However, the complaint lacks any detailed factual allegations against Deloitte regarding its involvement with ABVC's unaudited financial statements. The Plaintiff's allegations against Deloitte regarding false and misleading misrepresentations deal with information included or omitted from the *audited* financial statements, not from *unaudited* financial statements.

[7] The Plaintiff alleges that Deloitte is primarily liable based on Section 10b and Rule 10b-5 for misrepresentations and omissions it made in its audited financial statements of AVBC. The Ninth circuit has held that an accounting firm may be held liable for representations made by others if the firm significantly participated in a fraudulent scheme. *See, In re Software Toolwords, Inc.*, 50 F.3d 615 (9th Cir. 1995) (complaint

to judgment as a matter of law relating to Binder's individual claims based on Section 10b and Rule 10b-5.

Deloitte also argues that Binder cannot establish loss causation. To show damages resulting from loss causation, a plaintiff must show that the alleged misrepresentation and omission resulted in the stock's decline in value and that the loss was either a direct result or a reasonably foreseeable result of the misleading statement or omission. *See, In re Worlds of Wonder Securities Lit.*, 35 F.3d 1407 (9th Cir. 1994); *McGonigle*, 968 F.2d at 820. As stated in

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establishes primary liability because plaintiff submitted evidence that auditor played a significant role in drafting and editing the SEC letter). However, the Court concludes that Plaintiff has failed to submit persuasive evidence that Deloitte even reviewed or audited the 1991 10-Q reports. At most, the record reflects that Deloitte may have provided AVBC with stylistic assistance to place the 10-Q reports in proper form. No evidence was submitted that Deloitte reviewed the statements or representations contained in the reports which were clearly marked as "unaudited." *See*, Dkt. #269, Exh. G. *cf, Sloane Overseas Fund, Ltd. v. Sapiens Int'l Corp.*, 941 F.Supp. 1369, 1379 (S.D.N.Y. 1996) (allegations regarding the unaudited financial statements are immaterial with respect to Deloitte; Deloitte issued no statement about these financial statements); *Gruber v. Price Waterhouse*, 776 F.Supp. 1044, 1047-48 (E.D. Pa. 1991) (plaintiff cannot rely on alleged statements by Price Waterhouse because Price did not certify the statements which were clearly marked unaudited and plaintiff cannot contend that he trusted the prospectus merely because Price was associated with it; Price's reputation does not equate with reliance in holding the auditor an insurer of every other participant's work product and representations); *Rich v. Touche Ross & Co.*, 415 F.Supp. 95, 98 (S.D.N.Y. 1976) (a plaintiff cannot rely, as a matter of law, on unaudited financial statements for purposes of a Rule 10b-5 claim against an auditor).

McGonigle, plaintiff "must show that the difference in [the] value of [his] investment was connected to and a result of the misrepresentations or concealments of the defendants, and not from some other cause or causes." *McGonigle*, 968 F.2d at 820 n.9.

Deloitte contends that because Binder purchased his stock before any of the allegedly misleading financial statements and reports audited by Deloitte were disclosed, it would have been impossible for those alleged misrepresentations and/or omissions to have affected the stock price at which Binder purchased.

Because the Court finds that Binder purchased his stock before any audited reports or audited financial statements were disseminated, as a matter of law Binder will be unable to show loss causation to support his Section 10b and Rule 10b-5 claims. As such, the Court concludes that no genuine issues of material fact exist and that Deloitte's motion for summary judgment should be granted. Pursuant to Rule 54(b) the Court will grant final judgment as it pertains to Defendant Deloitte & Touche on all federal and state counts, both individually and as a class, as alleged in the first amended complaint. No just reason for delay exists as to this entry of judgment.

III.

MOTIONS FOR CLARIFICATION AND/OR RECONSIDERATION

The parties seek clarification and/or reconsideration on various issues ruled upon by the Court in its Order of February 14, 1997. Plaintiff moves for reconsideration of

the Court's Order imposing sanctions against him for conduct surrounding the deposition of Golden Brands Distributor. (Dkt. #383). Plaintiff also moves for clarification or for reconsideration of the Court's reliance on expert reports when it granted Deloitte & Touche's motion for summary judgment. (Dkt. #387). Finally, Plaintiff moves for clarification or for reconsideration of the Court's Order striking the declarations of Thomas Tollefson. (Dkt. #391).

Legal Standard:

The legal standard regarding motions for clarification or reconsideration employed in this Court is straightforward. The Ninth Circuit has stated three grounds for which a motion to reconsider may be based: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice. *See, Painting Industry of Hawaii Market Recover Fund v. U.S. Dept of Air Force,* 756 F.Supp. 452, 453 (D. Haw. 1990) *rev'd on other grounds,* 26 F.3d 1479 (9th Cir. 1994).

In addition, Judge Lodge stated that a motion for reconsideration "is appropriate where 'the court has patently misunderstood a party, or has made a decision outside the adversarial issues presented to the court by the parties, or has made an error not of reasoning but of apprehension.' A motion for reconsideration is not a haven for parties dissatisfied with a court's ruling. It is also not a vehicle designed to enable parties to present to the court additional arguments or to restate issues previously argued." *Palmer v. Higgins,* (D. Idaho Case No.

89-3032, Aug. 27, 1992) citing *Above The Belt, Inc. v. Mel Bohannon Roofing, Inc.*, 99 F.R.D. 99 (E.D. Va. 1983).

Moreover, Judge Boyle has found that:

> It is clear that a motion to reconsider must do two things: (1) "it must demonstrate some reason why the court should reconsider its prior decision;" and (2) "it must set forth facts or law of a strongly convincing nature to induce that court to reverse its prior decision." A court's order may be reconsidered if "the Court made a clear error of law or if the prior order caused a manifest injustice to occur." "In order for a party to demonstrate clear error, the moving party's arguments cannot be the same as those made earlier." It is clear that if a party "simply inadvertently failed to raise the arguments earlier, the arguments are deemed invalid." Thus, in the instant action, the Court must consider whether the Plaintiffs have set forth "facts or law of a strongly convincing nature," which would "induce the Court to reverse its prior decision."

Chapple v. Internal Revenue Serv., (D. Idaho Case No. MS 95-4487, Apr. 18, 1996) (citations omitted).

Discussion

1. Plaintiff's Motion for Reconsideration of Court's Order Imposing Sanctions

Plaintiff moves for reconsideration of the Court's imposition of sanctions pertaining to conduct surrounding the deposition of Golden Brands. (Dkt. #383). The Order of February 14, 1997, imposed sanctions in the

amount of $648.00 against Plaintiff and its counsel pursuant to Federal Rule 26(g)(3). The Court found sanctions appropriate because the Plaintiff failed to notify Deloitte (and the other Defendants) that a subpoena duces tecum had been propounded upon Golden Brands Bottling Company, a non-party to the litigation. Plaintiff attempted to conduct the deposition of Golden Brands using documents produced to Plaintiff pursuant to the subpoena which documents had not been provided to the Defendants. Because Deloitte (and the other Defendants) were unprepared to continue the deposition, it had to be rescheduled and the Court awarded Deloitte its expenses associated with the aborted deposition. *See*, Dkt. #366 at 44.

The Court specifically found that the Plaintiff had obtained documents from Golden Brands pursuant to the unnoticed subpoena duces tecum. The Federal Rules require that notice of a subpoena duces tecum be served upon all parties (*See*, Fed. R. Civ. P. 45 (b)(1)) and that the subpoena be attached to the notice of deposition. (Fed. R. Civ. P. 30(b)(1)). The Court concluded that the subpoena was not attached to the notice of deposition and that the Defendants had no notice that Golden Brands produced the documents. As a sanction pursuant to Rule 26(g)(3) the Court awarded Deloitte its costs and expenses resulting from the deposition for "Plaintiffs' failure to properly provide notice of the subpoena duces tecum pursuant to Rule 45(b)(1) and failure to attach or include the subpoena duces tecum in the Golden Brands' deposition notice in violation of Rule 30(b)(1)." (Dkt. #366 at 45-46).

The Plaintiff asserts that the Court may have failed to take into consideration or take into account the Plaintiffs'

response and opposition to Deloitte's motion. Specifically, Plaintiff contends that the Court may have overlooked the declarations of Robert H. Bretz and Mary M. Park which asserted that the deposition notice included a copy of the subpoena duces tecum.

The Court considered both the declaration of Mr. Bretz and Ms. Park when it found that the subpoena had not been provided in the notice of deposition. The Court found the submitted declarations inadequate to overcome the persuasive evidence contained in the deposition transcript itself wherein each Defendant stated they had neither received notice of the subpoena nor the documents produced by Golden Brands. Again, the Court considered the materials and declarations submitted by the Plaintiff and found them unpersuasive.

The Court finds that Plaintiff has failed to "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior-decision." *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987). In order for a party to demonstrate that the court has committed clear error, the moving party's arguments cannot be the same as those made earlier. The Court finds that Plaintiff presents the same arguments as the Court previously considered and rejected. Plaintiff's motion for reconsideration regarding the imposition of sanctions will be denied.

2. Plaintiffs' Motion for Clarification/Reconsideration of Court's Order Relying of [sic] Expert Reports

Plaintiff moves for clarification and/or reconsideration of the Court's reliance on certain expert reports in granting Deloitte's motion for summary judgment. (Dkt. #387). In support of its motion for summary judgment, Deloitte submitted the expert reports of M. Chapman Findlay III and D. Dale Willman and a report by Wright Houlihan. Plaintiff asserts that none of the reports were the subject of any affidavit, declaration or evidentiary submission showing the admissibility of such reports and contends that the reports are nothing more than out of court statements, inadmissible for the Court's consideration. Plaintiff maintains that it essentially ignored the statements contained in the reports because it did not believe that the Court would accept and rely on them. Plaintiff also contends that the reports should not have been considered because the drafters were not subject to cross-examination by way of deposition and cite *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) for the proposition that a party opposing a Rule 56 motion must have an opportunity to conduct discovery so as to be able to fairly oppose the substance of the motion.

Beginning with the Plaintiff's argument that it must be given the opportunity to depose the expert, the Court rejects Plaintiff's contention. *Anderson* does not stand for the position which Plaintiff advances. Plaintiff had the opportunity to conduct discovery and identify experts on its behalf to counter the substance of the Rule 56 motion. Indeed, Plaintiff submitted and the Court considered the

report of Dr. Hekman regarding the merits of the motion for summary judgment. Plaintiff cites no relevant authority for the proposition that an expert submitting a report in conjunction with a motion for summary judgment must be deposed prior to the disposition of the motion.

Plaintiff's argument that the reports were not properly before the Court is similarly flawed. The reports were submitted and authenticated by declaration of Deloitte's counsel and Deloitte alter submitted each expert's declaration attesting to the truth of the statements contained in the reports. These declarations were given before the Court considered the reports and the Court properly relied upon them. Moreover, Plaintiff's assertion that it in effect "ignored" the reports is not a sufficient basis for the Court to now reject the reports. Finally, the Court specifically finds that its consideration of the Wright Houlihan report was not clear error as both parties submitted the report for the Court's consideration. The Court views Plaintiff's objection to the Wright Houlihan report as evidentiary in nature. The Court considers the report as authenticated by both parties and the report originated as part of AVBC's ongoing business and in the course of its business. As such, the Court finds that the business records exception to the hearsay rule would remove the report from any hearsay objection.

In concluding that no genuine issues of material fact existed and that Deloitte was entitled to judgment as a matter of law, the Court primarily relied on existing case law. Summary judgment is appropriate if the moving party who does not have the burden at trial shows that the non-moving party cannot sustain its burden of proof as a matter of law. Deloitte satisfied this test. In opposing

the motion, the Plaintiff failed to submit any evidence which raised a triable issue of material fact. This failure, not the reports submitted by Deloitte, primarily lead to the Court's conclusion.

The Court finds that Plaintiff has not shown that the previous ruling bears clarification or reconsideration. Plaintiff has failed to "set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Great Hawaiian Financial Corp. v. Aiu*, 116 F.R.D. 612, 616 (D. Haw. 1987). In order for a party to demonstrate that the court has committed clear error, the moving party's arguments cannot be the same as those made earlier or arguments which could have been made earlier but were not. Plaintiff's motion for clarification and/or reconsideration regarding the use of the expert reports will be denied.

3. Plaintiffs' Motion for Clarification/Reconsideration of Court's Order Striking Tollefson Declarations

Plaintiff moves for clarification and/or reconsideration of the Court Order striking the declarations of Thomas Tollefson. (Dkt. #391). The Order of February 14, 1997, struck the Tollefson declarations submitted by Plaintiffs both in support and in opposition to various motions for summary judgment. In finding that the declarations failed miserably in meeting the requirements of Rule 56(e), the Court struck the declarations because of lack of foundation as to personal knowledge and because the declarant's expertise and credentials had not been established as to the opinions he sought to assert.

The Plaintiff now seeks clarification as to which portions of the declarations were stricken.[8] Plaintiff contends that nothing more than the objectionable opinion testimony should be excluded and that the documents and materials identified and referenced in the declarations should remain part of the record. Plaintiff also seeks clarification regarding which declarations were stricken. Plaintiff asserts that if the Court intended to strike more than merely the objectionable opinion testimony, the Court should reconsider its decision.

The Wilson Defendants and Defendant Deloitte & Touche joined in moving to strike the Tollefson declarations submitted in conjunction with the motions for summary judgment including: (1) the 15 page declaration submitted in support of the Plaintiffs' motion for summary judgment against Deloitte (Dkt. #269); (2) the 3 page supplemental declaration submitted with the Plaintiffs' motion for summary judgment of issues of liability against Deloitte (Dkt. #268); (3) the 26 page declaration submitted with Plaintiffs' opposition to Deloitte's motion for summary judgment (Dkt. #306); (4) the 8 page declaration submitted with the Plaintiffs' motion for summary judgment against Defendant Wilson (Dkt. #278); and (5) 15 page declaration submitted in support of Plaintiffs' joint opposition to the Wilson Defendants' motion for

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[8] Subsequent to the June 19, 1997, hearing, Defendant Deloitte & Touche filed a supplemental memorandum and request in response to Plaintiff's motion for clarification and/or reconsideration of the Court's Order striking the Tollefson declarations. The Court views Deloitte's supplemental response and request as unnecessary in light of the Court's ruling below and therefore, will not consider the merits of the request.

summary judgment. (Dkt #320). No motion to strike was made regarding the 2 page declaration submitted with the exhibits in support of Plaintiffs' motion for summary judgment against Defendant Wilson.

Because the parties may be unsure which declarations were stricken, the Court will clarify its ruling. The Court has stricken the following documents: (1) the 15 page declaration submitted in support of the Plaintiffs' motion for summary judgment against Deloitte (Dkt. #269); (2) the 3 page supplemental declaration submitted with the Plaintiffs' motion for summary judgment of issues of liability against Deloitte (Dkt. #268); (3) the 26 page declaration submitted with Plaintiffs' opposition to Deloitte's motion for summary judgment (Dkt. #306); (4) the 8 page declaration submitted with the Plaintiffs' motion fur summary judgment against Defendant Wilson (Dkt. #278); and (5) the 15 page declaration submitted in support of Plaintiffs' joint opposition to the Wilson Defendants' motion for summary judgment. (Dkt. #320).

Although the Court struck the declarations, it did not strike and did consider properly identified and authenticated exhibits such as, deposition testimony, discovery responses, business records, and public records which were attached to the declarations. Thus, to the extent that the declaration merely identified these exhibits, the Court did not consider those "statements" as stricken, even though it indicated that the declarations were stricken as a whole. However, the Court did not consider exhibits personally prepared by Tollefson or other unauthenticated exhibits, including charts summarizing dates or trends of various events in the life of AVBC, because Tollefson failed to establish his expertise or credentials as

to the summaries or exhibits he sought to provide. Therefore, the Court grants in part Plaintiff's motion to clarify and/or reconsider its Order striking the Tollefson declarations consistent with the foregoing discussion.

IV.

CERTIFYING THE CASE FOR APPEAL

The Plaintiff seeks the Court to certify the case for appeal as it now stands before the Court decides any further dispositive motions. As such, the Plaintiff moves for an entry of judgment which will allow the Plaintiff to appeal the case as a final judgment. (Dkt. #385-1). Alternatively, the Plaintiff moves the Court to certify the case for appeal under 28 U.S.C. § 1292(b) and for an order staying the remaining claims pending the appeal. (Dkt. #385-2). The Court will now take up Plaintiff's related motions.

Legal Standard:

Rule 54(b) of the Federal Rules of Civil Procedure provides for the entry of final judgment as to one or more but fewer than all of the claims or parties in cases involving multiple claims or multiple parties:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express

> direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. P. 54(b).

In order to enter a final judgment pursuant to Rule 54(b), the court must first determine that a final judgment has occurred under 28 U.S.C. § 1291. *Sears, Roebuck & Co. v. Mackey,* 351 U.S. 427, 438, 76 S.Ct. 895, 100 L.Ed. 1297 (1956) (Rule 54(b) scrupulously recognizes the statutory requirement of a "final decision" under Section 1291 as a basic requirement for an appeal to the Court of Appeals.).[9] The court's decision must be a judgment in the sense that it is a ruling upon a cognizable claim for relief, and it must be "final" in the sense that it is "an ultimate disposition of a claim entered in the course of a multiple claims actions." *Id.; Curtiss-Wright Corp. v. General Electric Co.,* 446 U.S. 1, 7, 100 S.Ct. 1460, 64 L.Ed.2d 1 (1980).

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[9] Section 1291 provides in part that:

> The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1291.

28 U.S.C. § 1292(b) provides that:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b).

Discussion:

Plaintiff moves pursuant to Rule 54(b) and 28 U.S.C. § 1292(b) for an order allowing immediate appeal to the Ninth Circuit Court of Appeals of the Court's previous rulings, including the Court Order of February 14, 1997, which decertified the class status of the case. Conversely, Defendants' argue that the Court should determine Albert Binder's individual claims which would allow an appeal as a matter of right under 28 U.S.C. § 1291 and Rule 54(b).

The Court concluded above that Albert Binder could not sustain his individual federal claims against Defendants Wilson, Stevens, and Fitchey and Defendant Deloitte & Touche. As to these four Defendants the Court will decline to exercise supplemental jurisdiction of the individual state law claims. Previously, on February 14, 1997, the Court concluded that no class claims, either federal or state, existed against these Defendants as well. Based on the foregoing, and pursuant to Rule 54(b), the Court will grant final judgment as it pertains to Defendants Wilson, Stevens, and Fitchey and Defendant Deloitte & Touche on all federal and state counts, both class and individual claims, alleged in the first amended complaint. No just reason for delay exists as to this entry of judgment.

Because final judgment under Rule 54(b) is being entered, the Court need not certify the action for appeal under 28 U.S.C. § 1292(b). In addition, the Court will not set any of the remaining claims for trial pending the disposition of appeal, if any. Moreover, the Court sees no reason to toll the statute of limitations for the class claims. If the Court's decisions dismissing the Plaintiff's claims is reversed on appeal, no prejudice exists because the reversal will apply retroactively to the date the Court issued its decision. If the Court's decision is affirmed, that ruling will sustain the finding that the class action was improper and the conclusion that class claims were improperly alleged.

V.

MISCELLANEOUS MOTIONS

The Plaintiff has filed four miscellaneous motions which will be addressed at this time. The Plaintiff has moved to strike the answer filed by Defendant Deloitte and Touche to the first amended complaint. (Dkt. #35). The Plaintiff also moves to strike expert reports and other material submitted by Defendant Deloitte in support of its motion for summary judgment against Albert Binder. (Dkt. #415). Further, Plaintiff seeks a Court order that the first amended complaint properly pleads a claim for punitive damages and moves that such a claim be included in the complaint. (Dkt. #363). Finally, Plaintiff moves for an order and entry of default against Thomas and Marie Gillespie. (Dkt. #389). These motions will be taken in turn.

1. Plaintiffs' Motion to Strike Deloitte's Answer

Plaintiff moves pursuant to Rule 12(f) of the Federal Rules of Civil Procedure for an order striking Deloitte & Touche's answer to the first amended complaint. (Dkt. #351). Plaintiff contends that the answer fails to respond to the allegations of the complaint and includes new and different affirmative defenses not previously set forth in the Defendant's original answer. Plaintiff argues that rather than answering the complaint, Deloitte instead responded that it was declining to answer the allegations contained in the Complaint pending the Court's ruling on outstanding motions.

Deloitte opposes the motion and argues that in response to the amended complaint it filed a motion to dismiss the state law claims and a motion to strike certain allegations in the complaint. Deloitte contends that it was under no duty to answer the complaint until after the Court ruled on the motions. Deloitte cites Rule 12(a) which provides in part that:

> A defendant shall serve an answer within 20 days after the service of summons and complaint upon that defendant . . . The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action;

Fed. R. Civ. P. 12(a).

Deloitte contends that it answered the majority of the Plaintiff's allegations in the first amended complaint and that it reserved its right to answer the remaining allegations once the Court ruled on the pending motion to strike and motion to dismiss.

Deloitte also maintains that the affirmative defenses asserted in the amended answer were also asserted in the original answer, although differently numbered and does admit that it is alleging one new affirmative defense in its amended answer. Deloitte contends that it is entitled to assert the new affirmative defense because the amended complaint supersedes the original complaint and renders it of no legal effect. As such, Deloitte argues that it is able to assert new defenses in its amended answer. Deloitte

contends that the new defense merely asserts the legal positions espoused by the United States Supreme Court in *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 114 S.Ct. 1439 (1994) which provides that private plaintiffs may not maintain suits for aiding and abetting liability under Section 10b of the Securities Exchange Act of 1934. Deloitte states it asserted the defense because of the new allegations in the amended complaint which allege that Deloitte aided, abetted and assisted.

Finally, Deloitte argues that the cross-claim against AVBC was included in its original answer and that it merely reasserted all cross-claims previously raised. Deloitte contends it has no intention of pursuing the cross-claim while AVBC is in bankruptcy and subject to the automatic stay provision in the Bankruptcy Act.

The Court finds that based on Rule 12(a) Deloitte was under no obligation to respond to the amended complaint until after the Court had ruled on the Rule 12(b) motions. The Court denied Deloitte's motion to strike certain allegations from the complaint and found Deloitte's motion to dismiss state law claims moot. So as to not prejudice the Defendants, the Court finds that they would be given a reasonable amount of time to answer the amended complaint following the February 14, 1997, Order issued by the Court. The Court finds that Deloitte's affirmative defenses, although numbered differently, were carried over from the original answer except for the Eighth Affirmative Defense. The Court concludes that the new defense in no manner prejudices Plaintiff because Deloitte would be able to assert the Supreme Court decision in *Central Bank of Denver* regardless whether the defense was contained in the answer. Finally, the Court

concludes the Deloitte merely reasserted all its cross-claims, including the claim against AVBC, which were included in the original answer. Of course, Deloitte would not be permitted to advance the claim absent relief from the automatic stay provisions of the Bankruptcy Act. For these reasons the Plaintiff's motion to strike Deloitte's answer will be denied.

2. Plaintiff's Motion to Strike Deloitte's Expert Reports and Other Material

Plaintiff moves to strike the expert reports and other materials submitted by Defendant Deloitte & Touche in conjunction with its motion for summary judgment against Binder's individual claims. (Dkt. #415). Plaintiff asserts the identical arguments raised in its motion to clarify and/or reconsider the Court's reliance on the reports and materials for the purposes of the Court's ruling on motions for summary judgment against the class claims. (Dkt. #387). For the same reasons which denied the Plaintiff's motion for clarification and/or reconsideration, the Court denies the Plaintiff's motion to strike.

3. Plaintiff's Motion that Complaint Properly Pleads Punitive Damages

Plaintiff moves pursuant to Rule 7(b) of the Federal Rules of Civil Procedure and Idaho Code Section 6-1604 for an order that the first amended complaint properly pleads punitive damages. Section 6-1604 provides that no

claim for punitive damages may be filed unless the plaintiff establishes a reasonable likelihood of proving facts at trial sufficient to support an award of punitive damages. Plaintiff contends that the facts of the case show that there is a reasonable likelihood of proving facts at trial to support an award of punitive damages against Defendants Karban, Wilson, Sim, Fitchey, Stevens and Deloitte. Plaintiff agrees not to seek an award of punitive damages against Defendants Thomas Gillespie, Marie Mullen Gillespie or Defendant Good.

Because final judgment pursuant to Rule 54(b) as [sic] been entered against certain Defendants, the Court will dismiss without prejudice the Plaintiff's motion to plead punitive damages. The Plaintiff may renew the motion in the event that any of the claims alleged in the first amended complaint are scheduled for trial on the merits.

4. Plaintiff's Motion for Order and Entry of Default Against the Gillespies

Plaintiff moves pursuant to Federal Rules 55(b)(2), 54(b) and 54(d) for an immediate entry of final judgment against Defendants Thomas and Marie Mullen Gillespies (the "Gillespies") for damages and attorney fees in the amount of $35,000.00 (Dkt. #389). Plaintiff states that default has already been entered against the Gillespies and now seeks entry of final judgment so as to commence the running of the time period to appeal the entry of default and to establish a basis for the Plaintiff's third-party claim against an insurance policy maintained by AVBC.

The Court finds that entry of default and final judgment are appropriate and that the Plaintiff has shown entitlement to the amount of damages demanded based on the pleadings.[10] The Plaintiff submitted an affidavit detailing his loss at $5,736.00. The Court will enter final judgment against Thomas Gillespie and Marie Mullen Gillespie in this amount, including prejudgment interest at the current rate.

In addition, Plaintiff seeks $25,000 in attorney fees. The awarding of attorney fees in actions such as this lie in the sound discretion of the Court. *See, Chris-Craft Industries, Inc. v. Piper Aircraft Corp.*, 516 F.2d 172, 192 (2nd Cir. 1975); *Warren v. The Reserve Fund, Inc.*, 728 F.2d 741, 748 (5th Cir. 1984). The Court finds that Plaintiff has failed to submit any legal authority which would support an award of attorney fees. The Court will grant Plaintiff 10 days from receipt of this Order to submit supplemental briefing regarding the legal basis for attorney fees. The supplemental briefing should include a detailed affidavit establishing the exact amount of fees he is seeking. After reviewing the briefing, the Court will consider if a hearing regarding the awarding of fees is necessary.

VI.

CONCLUSION

For purposes of clarification the Court will state which claims remain and which claims are subject to Rule

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[10] The Ninth Circuit has provided that a plaintiff must present evidence of damages. *See, Dundee Cement Co. v. Howard Pipe & Concrete Prod., Inc.*, 722 F.2d 1319, 1323 (9th Cir. 1983).

54(b) final judgment. The Court's February 14, 1997, Order found that the class could not sustain Count One against any of the Defendants. Thus, the Court decertified the class and declined to exercise supplemental jurisdiction over the class' state law claims. This Order and the February 14 Order produce the following results:

The following claims remain before the Court:

(1) Binder's individual claims based on Count One, Four, Seven, Eight, Nine, Ten and Eleven against Defendant Sim, Defendant Karban, Defendant Good, Defendant Strader, Defendant Bahoshy, and Defendant AVBC.

The following claims have been dismissed:

(1) All class claims based on Count One against all Defendants. Moreover, supplemental jurisdiction will not be exercised regarding the class' state law claims.

(2) Binder's individual Count Two against Defendant Karban.

(3) Binder's individual Count Five against all Defendants.

The following claims have been disposed via final judgment pursuant to Rule 54(b):

(1) all class and individual claims, both federal and state, against Defendant Deloitte & Touche, Defendant Wilson, Defendant Stevens, Defendant Fitchey, Defendant Thomas Gillespie and Defendant Marie Mullen Gillespie.

ORDER

Based upon the foregoing, the Court having been fully informed in the premises, IT IS HEREBY ORDERED that

(1) Plaintiff's motion to compel attendance (Dkt. #232-2) is MOOT;

(2) Plaintiff's motion to strike the answer of Defendant Deloitte & Touche (Dkt. #351) is DENIED;

(3) Plaintiff's motion for order that complaint plead punitive damages (Dkt. #363) is DENIED without prejudice. Plaintiff may renew the motion if and when the remaining claims are set for trial;

(4) Defendant Karban's motion to dismiss second cause of action in the first amended complaint (Dkt. #370) is GRANTED;

(5) Plaintiff's motion for reconsideration of Court's order imposing sanctions (Dkt. #383) is DENIED;

(6) Plaintiff's motion for entry of final judgment (Dkt. #385-1) is GRANTED as it pertains to Defendants Wilson, Stevens and Fitchey and to Defendant Deloitte & Touche regarding all individual and class claims based on federal and state law;

(7) Plaintiff's motion for certification of appeal under 28 U.S.C. § 1292(b) (Dkt. #285-2) is DENIED;

(8) Plaintiff's motion to clarify or for reconsideration of the admissibility and the

Court's reliance on Defendant Deloitte and Touche's two expert reports and the Wright Houlihan report for purposes of the Court's ruling on the Defendants' motions for summary judgment (Dkt. #287) is DENIED;

(9) Plaintiff's motion for order and entry of judgment on Binders' individual claims against Defendant Gillepies [sic] following entry of default (Dkt. #389) is GRANTED in the amount of $5,736.00, including pre-judgment interest. Plaintiff's motion for attorney fees is STAYED. Plaintiff shall submit supplemental briefing regarding the legal basis for attorney fees and a detailed affidavit supporting the exact amount of claimed fees within 10 days of receipt of this Order;

(10) Plaintiff's motion to clarify or for reconsideration of the Court's order striking the declaration of Thomas Tollefson (Dkt. #391) is GRANTED in part and DENIED in part and is clarified consistent with this Order;

(11) Defendants Wilson, Sim, Stevens and Fitchey motion for clarification of summary adjudication and entry of judgment (Dkt. #393) is GRANTED in part and DENIED in part;

(12) Defendant Deloitte & Touche's motion for summary judgment against Albert Binder (Dkt. #396) is GRANTED;

(13) Defendant Good's motion to dismiss (Dkt. #402) is DENIED;

(14) Plaintiff's motion to strike Defendant Deloitte & Touche's expert reports and materials submitted in support of its motion for summary judgment (Dkt. #415) is DENIED.

DATED this the 3 day of July, 1997.

/s/ Mikel H. Williams
MIKEL H. WILLIAMS
Chief United States
Magistrate Judge

MAILING CERTIFICATE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this ___ day of ___, 19___, to the following parties:

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BOISE IDAHO 83701

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1442 SW 158th AVENUE
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by Deputy Clerk